Supreme Court, U.S.
FILED
JAN 17 1996
CLERK

No. 95-991

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CITIBANK (SOUTH DAKOTA), N.A.,

Petitioner,

v.

MARC SHERMAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

AMICI CURIAE BRIEF OF MASTERCARD INTERNATIONAL INCORPORATED AND VISA U.S.A. INC. IN SUPPORT OF PETITIONER'S REQUEST FOR WRIT OF CERTIORARI

SHIRLEY M. HUFSTEDLER
Counsel of Record
L. RICHARD FISCHER
JAMES A. HUIZINGA
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 887-1500

January 17, 1996

Attorneys for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE NEW JERSEY SUPREME COURT AND STATE COURTS OF LAST RESORT IN TWO STATES AS WELL AS TWO FEDERAL COURTS OF APPEALS	4
II. THE ISSUE OF WHETHER LATE FEES ARE COVERED BY SECTION 85 AND SECTION 521 OF DIDA IS OF FUNDAMENTAL IMPORTANCE	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page(s)

CASES

Cades v. H & R Block, Inc., 43 F.3d 869 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2247 (1995) 3

Copeland v. MBNA America Bank, N.A., No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for cert. filed*, (U.S. Dec. 28, 1995) (No. 95-1056) 4, 5

Federal Deposit Insurance Corporation v. Philadelphia Gear Corp., 476 U.S. 426 (1986) 6

Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n, 845 F.2d 519 (5th Cir. 1988) 2

Greenwood Trust Co. v. Massachusetts, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) 2, 5

Harris v. Chase Manhattan Bank, N.A., 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal. Rptr. 2d 346, *review dismissed*, 905 P.2d 417, 46 Cal. Rptr. 2d 748 (Cal. 1995), *petition for cert. filed*, 64 U.S.L.W. 3438 (U.S. Dec. 18, 1995) (No. 95-951) 5

Hunter v. Greenwood Trust Co.,
No. A-103-94, 1995 N.J. LEXIS 1354
(N.J. Nov. 28, 1995), *petition for cert. filed*,
64 U.S.L.W. 3439 (U.S. Dec. 18, 1995)
(No. 95-963) 5

Marquette National Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978) 6

NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.,
115 S. Ct. 810 (1995) 6

Richardson v. Citibank (South Dakota), N.A.,
No. 94SC670, 1995 Colo. LEXIS 767
(Colo. Dec. 18, 1995) 4, 5

Sherman v. Citibank (South Dakota), N.A.,
No. A-102-94, 1995 N.J. LEXIS 1355
(N.J. Nov. 28, 1995) ..... *passim*

Smiley v. Citibank (South Dakota), N.A., 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441,
900 P.2d 690 (1995), *petition for cert. filed*,
64 U.S.L.W. 3417 (U.S. Nov. 30, 1995)
(No. 95-860) ..... *passim*

Spellman v. Meridian Bank,
No. 94-3203, 1995 U.S. App. LEXIS 37149
(3d Cir. Dec. 29, 1995) 4, 5

Stoorman v. Greenwood Trust Co.,
No. 94SC382, 1995 Colo. LEXIS 764
(Colo. Dec. 18, 1995) 5

STATUTES

12 U.S.C. § 85 ..... *passim*

Sections 521 through 523 of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980) ..... *passim*

RULES

S. Ct. R. 10(b) 4

OTHER AUTHORITIES

Letter from Julie Williams, OCC Chief Counsel (Feb. 17, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 90,467 6

Letter from Douglas Jones, Deputy General Counsel (July 8, 1992), *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534 6

Proposed 12 C.F.R. § 7.4001, 42 Fed. Reg. 11,924 (Mar. 3, 1995) 6

Card Industry Directory (Faulkner & Grey 1996) 8

The Nilson Report, Issue No. 591 (Mar. 1995) 2

The Nilson Report, Issue No. 603 (Sept. 1995) 7, 8

No. 95-991

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CITIBANK (SOUTH DAKOTA), N.A.,

Petitioner,

v.

MARC SHERMAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

AMICI CURIAE BRIEF OF MASTERCARD INTERNATIONAL INCORPORATED AND VISA U.S.A. INC. IN SUPPORT OF PETITIONER'S REQUEST FOR WRIT OF CERTIORARI

This amici curiae brief is filed in support of Citibank (South Dakota), N.A. by MasterCard International Incorporated ("MasterCard") and VISA U.S.A. Inc. ("VISA"). MasterCard and VISA (collectively, "Amici") agree with Petitioner that a writ of certiorari should be granted in *Sherman v. Citibank (South Dakota), N.A.*, No. A-102-94, 1995 N.J. LEXIS 1355 (N.J. Nov. 28, 1995)

("*Sherman*"). Petitioner and Respondent each provided written consent to filing this amici curiae brief.

INTEREST OF AMICI

VISA and MasterCard are associations of financial institutions that license service marks for use in connection with credit cards, debit cards, automated teller machines and related financial services. As of year-end 1994, VISA and MasterCard had approximately 17,000 and 13,600 depository institution members, respectively, that collectively have issued a credit card to most adults in the United States. *The Nilson Report*, Issue No. 591 (Mar. 1995) at 8.

Amici's members that are national banks are vitally interested in the proper interpretation of 12 U.S.C. § 85 ("Section 85"), which governs the interest that may be charged on loans made by national banks. Amici's members that are state-chartered banks, federally- or state-chartered savings associations, or federally- or state-chartered credit unions, also are particularly interested in the interpretation of Section 85 because most of these federally-insured depository institutions have authority under Sections 521 through 523 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), Pub. L. No. 96-221, 94 Stat. 132 (1980), to charge the same interest that national banks are authorized to charge under Section 85. *See, e.g., Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 830 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (Section 521) ("*Greenwood Trust*"); *Gavey Properties/762 v. First Fin. Sav. & Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988) (Section 522).

The discussion below focuses on the importance of this case for the credit card industry because *Sherman* deals with credit card loans. However, Section 85 and Sections 521 through 523 of DIDA are not limited to credit card

programs; they apply to all types of retail and commercial loans. *See, e.g., Cades v. H & R Block, Inc.*, 43 F.3d 869 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2247 (1995) (tax refund anticipation loans). Thus, the principle at issue in this case is critically important for virtually every lending function of the banking industry.

SUMMARY OF ARGUMENT

Certiorari should be granted to resolve an irreconcilable conflict between the New Jersey Supreme Court on the one hand, and the California and Colorado Supreme Courts and the United States Courts of Appeals for the First and Third Circuits on the other hand, on the important federal question of whether late fees are interest for purposes of Section 85 and Section 521 of DIDA. Immediate resolution of this issue is urgently needed to reestablish the uniform national rule that the federal government established for the national banking system, but that was not followed by the New Jersey Supreme Court.

Prompt review by this Court is imperative because uncertainty regarding the permissibility of late charges assessed with respect to billions of dollars of credit will adversely affect both the ability of borrowers to obtain credit and the national economy. Resolution of this issue also significantly affects the extraordinary liability plaintiffs seek to impose on Amici's members that have collected late fees permitted by federal law, but not the law of the borrower's state.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE NEW JERSEY SUPREME COURT AND STATE COURTS OF LAST RESORT IN TWO STATES AS WELL AS TWO FEDERAL COURTS OF APPEALS.

Review on a writ of certiorari is proper in this case because a state court of last resort has decided a federal question in a way that directly conflicts with the decisions of state courts of last resort in two other states and two federal Courts of Appeals. *See* Sup. Ct. R. 10(b).

Late fees charged by a national bank on credit card loans were held to be interest for purposes of Section 85 by the California Supreme Court in *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *petition for cert. filed*, 64 U.S.L.W. 3417 (U.S. Nov. 30, 1995) (No. 95-860) (*"Smiley"*), by the Colorado Supreme Court in *Copeland v. MBNA America Bank, N.A.*, No. 94SC409, 1995 Colo. LEXIS 743 (Colo. Nov. 20, 1995), *petition for cert. filed*, (U.S. Dec. 28, 1995) (No. 95-1056) ("*Copeland*"), and *Richardson v. Citibank (South Dakota), N.A.*, No. 94SC670, 1995 Colo. LEXIS 767 (Colo. Dec. 18, 1995) ("*Richardson*"), and by the United States Court of Appeals for the Third Circuit in *Spellman v. Meridian Bank*, No. 94-3203, 1995 U.S. App. LEXIS 37149 (3d Cir. Dec. 29, 1995) ("*Spellman*").

Similarly, late fees assessed on credit card loans by a state-chartered bank were held to be interest for purposes of Section 521 of DIDA by the United States Court of Appeals for the First Circuit in *Greenwood Trust*, by the Colorado Supreme Court in *Stoorman v. Greenwood Trust Co.*, No. 94SC382, 1995 Colo. LEXIS 764 (Colo. Dec. 18, 1995) ("*Stoorman*"), and by the California Court of Appeal in *Harris v. Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal. Rptr. 2d 346, *review dismissed*, 905 P.2d 417, 46 Cal. Rptr. 2d 748 (Cal. 1995), *petition for cert. filed*, 64 U.S.L.W. 3438 (U.S. Dec. 18, 1995) (No. 95-951) ("*Harris*").

The *Smiley*, *Copeland*, *Richardson*, *Spellman*, *Greenwood Trust*, *Stoorman* and *Harris* decisions persuasively and correctly explain why both Section 85 and Section 521 of DIDA apply to late fees. Nonetheless, the New Jersey Supreme Court held in *Hunter v. Greenwood Trust Co.*, No. A-103-94, 1995 N.J. LEXIS 1354 (N.J. Nov. 28, 1995), *petition for cert. filed*, 64 U.S.L.W. 3439 (U.S. Dec. 18, 1995) (No. 95-963) ("*Hunter*"), and in *Sherman* that late fees on credit card loans are not covered by Section 85 and Section 521 of DIDA because those statutes apply only to periodic percentage rate charges assessed on outstanding loan balances.

This conflict on the proper interpretation of Section 85 and Section 521 of DIDA is most acute in New Jersey. As a result of the Third Circuit's decision in *Spellman*, federal courts in New Jersey will recognize that late fees are interest under Section 85 and Section 521. However, state courts in New Jersey must follow the New Jersey Supreme Court's decisions in *Sherman* and *Hunter*, which are in direct conflict with *Spellman*.

Without resolution by this Court of the conflict on this critical issue, the scope of federal interest authority under Section 85 and Section 521 will vary depending on the state in which a bank's borrowers reside. Such a result would be inconsistent with the principle in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978), that Section 85 applies on the basis of the national bank's location and not the borrower's residence.

Not only does the New Jersey Supreme Court's interpretation of Section 85 and Section 521 of DIDA conflict with decisions from the California and Colorado Supreme Courts and the First and Third Circuits, it also conflicts with the interpretation of the federal agencies charged with interpreting these federal statutes. The Office of the Comptroller of the Currency (the "OCC") and the Federal Deposit Insurance Corporation ("FDIC") have stated repeatedly that credit card late fees are covered by Section 85 and Section 521, respectively. *See, e.g.*, Letter from Julie Williams, OCC Chief Counsel (Feb. 17, 1995), *reprinted in* [Current] Fed. Banking L. Rep. (CCH) ¶ 90,467 (reaffirming and restating the OCC's long-time position); Letter from Douglas Jones, FDIC Deputy General Counsel (July 8, 1992), *reprinted in* [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81,534.

In addition, as part of the OCC's general revisions to its interpretive rules, the OCC has proposed to codify its position that late fees are "interest." *See* proposed 12 C.F.R. § 7.4001, 42 Fed. Reg. 11,924, 11,940 (Mar. 3, 1995). Nonetheless, the New Jersey Supreme Court refused to grant to the interpretations of the federal agencies the deference called for by this Court in *NationsBank of North Carolina, N.A. v. Variable Annuity Life Insurance Co.*, 115 S. Ct. 810 (1995) and *Federal Deposit Insurance Corporation v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986).

The resolution by this Court of the central and fundamental federal question of whether Section 85 and Section 521 of DIDA apply to late fees is urgently needed now. There is no dispute that the late fees assessed by national and state banks in numerous pending lawsuits are permissible if Section 85 and Section 521 apply. A conclusive answer from this Court that late fees are interest thus will resolve those lawsuits, and avoid unnecessary, repetitive, costly, and disruptive additional litigation. Immediate resolution of the conflict on this issue also is essential to enable national and state banks to know what law applies to the late fees they charge on the billions of dollars of credit now being extended to borrowers, and to ensure that the national banking system functions effectively and efficiently.

II. THE ISSUE OF WHETHER LATE FEES ARE COVERED BY SECTION 85 AND SECTION 521 OF DIDA IS OF FUNDAMENTAL IMPORTANCE.

Financial institutions in the United States regularly extend enormous amounts of credit on credit card accounts. The outstanding balances on VISA and MasterCard credit cards issued in the United States alone exceeded $275 billion at mid-year 1995. *The Nilson Report*, Issue No. 603 (Sept. 1995) at 7. Amici's members which extend the hundreds of billions of dollars of credit must be able to determine whether late fees are included in the federal interest authority provided by Section 85 and Section 521, since late fees constitute a significant component of credit card pricing. Absent such guidance, banks cannot know whether their lending charges comply with applicable fee limitations. If they guess wrongly, they are exposed to tens, if not hundreds, of millions of dollars of liability for imposing excess fees.

The late fee itself is a very important price component of credit card loans. That fee facilitates the fair and efficient

administration of credit card programs; it allows card issuers "to impose default costs on late payers, who are responsible for them, and to avoid shifting [such costs] to timely payers, who are not." *Smiley*, 11 Cal. 4th at 161. In addition, late fees constituted a majority of the estimated $2.1 billion in miscellaneous fees (namely, fees other than periodic finance charges, annual fees and cash advance fees) that were collected by bank card issuers in 1994. *See Card Industry Directory* (Faulkner & Grey 1996) at 18.

This issue already has generated a significant amount of complicated, time-consuming, and expensive litigation. Over forty-five class action lawsuits and state enforcement actions have been filed across the country since November 1991 challenging whether Section 85 or Section 521 applies to late fees on credit card loans. To date, such cases have been filed in Alabama, California, Colorado, Maine, Massachusetts, Minnesota, New Jersey, Pennsylvania, South Carolina, and Wisconsin. In many instances, the plaintiffs' theories of state law violations could result in recoveries of a multiple of the allegedly excessive late fees, or even forfeiture of all charges (including periodic finance charges). Prompt resolution of the scope of Section 85 and Section 521 is thus needed to protect national banks and state banks from potentially ruinous damages under state law.

The current uncertainty also presents a clear risk of substantial disruption to the nation's credit card payment systems, which are critical to the functioning of the nation's economy. At mid-year 1995, there were approximately 343.1 million VISA and MasterCard credit cards issued domestically, which accessed about 252.9 million accounts. *The Nilson Report*, Issue No. 603 (Sept. 1995) at 7. Annualizing data for the first six months of 1995, there were approximately 5.5 billion transactions on VISA and MasterCard credit cards issued in the United States alone, for an aggregate volume of $490.5 billion. *Id.*

In reliance on existing case law and the interpretations of the OCC and FDIC, Amici's members have established pricing for their credit card accounts based upon the understanding that federal law controls the permissibility of late fees. If the courts do not follow the federal agencies' guidance on this point, the pricing structures of Amici's members will be at risk, leaving those institutions in a potentially precarious state. In addition, new interpretations of the applicable law that governs late fees will force Amici's members to engage in costly and time-consuming changes to existing account pricing strategies and systems for servicing their credit card accounts. The uncertainty and resulting dislocation are likely to impact significantly the availability of credit on bank cards nationwide.

CONCLUSION

For the reasons set forth above, Amici strongly urge the Court to grant the petition for certiorari in this case.

Respectfully submitted,

SHIRLEY M. HUFSTEDLER
Counsel of Record
L. RICHARD FISCHER
JAMES A. HUIZINGA
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 887-1500

Attorneys for Amici Curiae MasterCard International Incorporated and VISA U.S.A. Inc.